STATE OF MICHIGAN

COURT OF APPEALS

DEREK MICHAEL SALIB, by his Next Friend, LORI AL KAHIL,

Plaintiff-Appellant,

v

CHILD'S LAKE ETATES,

Defendant-Appellee,

and

TRACY MCGUIGAN,

Defendant.

UNPUBLISHED
September 16, 2004

No. 248715
Oakland Circuit Court
LC No. 2002-042377-NO

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Plaintiff, by his mother and next friend, appeals as of right the order granting defendant Child's Lake Estates summary disposition under MCR 2.116(C)(10). This case arose when plaintiff injured his knee by falling on a horseshoe stake owned by defendant Tracy McGuigan[1] and located on land owned by Child's Lake Estates. We affirm.

Plaintiff first argues that the trial court erred in allowing defendant's motion for summary disposition to be heard on April 16, 2003, when a scheduling order stated that all dispositive motions had to heard by April 3, 2003. We disagree. We review a court's decision whether to allow further filings after a discovery deadline for an abuse of discretion. *Carmack v Macomb Co Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993).

[1] McGuigan is not a party to this appeal. Thus, use of the term "defendant" throughout this opinion will refer solely to Child's Lake Estates, unless otherwise indicated.

Under MCR 2.116(D)(3), certain motions for summary disposition can be brought "at any time," and a motion pursuant to MCR 2.116(C)(10) is one of those motions. MCR 2.116(D)(3) removes any time limit for asserting such a motion for summary disposition. *Yee v Shiawasee Co Bd of Comm'rs*, 251 Mich App 379, 392 n 16; 651 NW2d 756 (2002). Therefore, the court did not abuse its discretion in allowing defendant's motion to be heard beyond the date set in the scheduling order. It would have been an abuse of discretion to deny hearing the motion solely because the motion was filed beyond the date in the scheduling order.

Even though the court refused to apply the open and obvious doctrine to plaintiff's negligence claim, defendant raises its open and obvious argument again as an alternative ground for affirmance. See *Cacevic v Simplimatic Engineering Co*, 463 Mich 997; 625 NW2d 784 (2001). According to defendant, the open and obvious doctrine applies to children, the stakes were open and obvious, and there were no special aspects of the stakes that made their risk of harm unreasonable. We agree. We review de novo a trial court's ruling on a motion for summary disposition. *Singerman v Muni Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). Under MCR 2.116(C)(10), a party may move to dismiss a claim on the basis that "there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

Defendant admits that plaintiff was an invitee. See *Stanley v Town Square Coop*, 203 Mich App 143, 149; 512 NW2d 51 (1993) (stating that tenants are invitees). And despite plaintiff's contention to the contrary, the open and obvious doctrine does apply to minor invitees. *Stopczynski v Woodcox*, 258 Mich App 226, 230-232; 671 NW2d 119 (2003). With respect to invitees, a landowner has a duty of care to warn the invitee of any known dangers and to make the premises safe. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). But a landowner's duty is not absolute; it does not extend to open and obvious dangers. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001); *Douglas v Elba, Inc*, 184 Mich App 160, 163; 457 NW2d 117 (1990). An open and obvious danger exists where the danger is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

Under the open and obvious doctrine, if the "condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). But "if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions." *Id.* Only special aspects of a condition "that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo*, *supra* at 519. Thus, a particular condition, like steps, may have an obvious danger (e.g., tripping and falling), but there may be certain special aspects of those particular steps that make the risk unreasonable. *Bertrand*, *supra* at 614; see also *Lugo*, *supra* at 525.

We agree with the trial court that the stakes were open and obvious because according to plaintiff's testimony there can be no dispute that he knew the stakes were there and appreciated the risk they posed. See *Riddle*, *supra* at 96. Thus, the critical question is whether there was

evidence that created a genuine issue of material fact regarding whether there were "special aspects" of these stakes differentiating their risk from the typical risks of horseshoe stakes to create an unreasonable risk of harm. *Lugo*, *supra* at 517. On this question, we also agree with the court's conclusion that the horseshoe stakes may have presented a potential for severe harm. But liability should not be imposed "merely because a particular open and obvious condition has *some* potential for severe harm." *Lugo*, *supra* at 518 n 2 (emphasis added). Reviewing the record, we conclude that plaintiff failed to present any evidence creating a question of fact regarding any special aspects that created an *unreasonable* risk of harm.

There is no genuine issue of material fact with respect to whether plaintiff's claim was barred by the open and obvious doctrine. See *Lugo*, *supra* at 520 n 4, 521. And despite the trial court's rejection of the open and obvious doctrine, we affirm the trial court's decision to grant defendant summary disposition because this Court will not reverse a lower court when it reaches the correct result albeit for the wrong reason. See *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997). Because we find this issue dispositive, we decline to address plaintiff's other argument related to his negligence claim.

Last, with respect to plaintiff's attractive nuisance claim, plaintiff argues the correct standard is found in *Gilbert v Sabin*, 76 Mich App 137; 256 NW2d 54 (1977), where this Court held that the attractive nuisance doctrine applies equally to trespassers and invitees. We agree that *Gilbert* applies, but disagree that all the elements of the doctrine have been met.

Michigan has adopted the attractive nuisance doctrine as set forth in 2 Restatement Torts, 2d, § 339.[2] *Pippin v Atallah*, 245 Mich App 136, 146; 626 NW2d 911 (2001). Although the plain language of § 343 indicates that the doctrine only applies to child trespassers, we have held that child invitees fall within the category of children protected under the attractive nuisance doctrine. *Gilbert*, *supra* at 143-144. And although the *Gilbert* decision has been ignored by recent unpublished decisions of this Court, those decisions are not precedentially binding on this Court. MCR 7.215(C)(1). All five conditions of the doctrine must be met before a possessor of land will be held liable for injury to a trespassing child. *Rand v Knapp Shoe Stores*, 178 Mich App 735, 741; 444 NW2d 156 (1989). Here, element (c) has not been met because there is no genuine issue of fact whether plaintiff discovered the condition or realized the risk involved. Plaintiffs' own deposition testimony clearly establishes that he discovered and realized the danger.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens

---

[2] § 339 reads:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children. [2 Restatement Torts, 2d, § 339, p 197.]